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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/768,394	01/24/2001	Franz Haas	WEB-19967	1357
24131 7590 09/15/2009 LERNER GREENBERG STEMER LLP P O BOX 2480 HOLLYWOOD, FL 33022-2480				
EXAMINER				
WONG, LESTLIE A				
ART UNIT		PAPER NUMBER		
1794				
MAIL DATE		DELIVERY MODE		
09/15/2009		PAPER		

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Office Action Summary

Application No.

09/768,394

Applicant(s)

HAAS ET AL.

Examiner

Leslie Wong

Art Unit

1794

Period for Reply -- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on April 3, 2008 and October 9, 2008.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 36 and 38-59 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 36, 46-48, 50-54 and 56-59 is/are rejected.
- 7) ☒ Claim(s) 38-45, 49 and 55 is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
- Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
- Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
 2. ☐ Certified copies of the priority documents have been received in Application No. _____.
 3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- 1) ☐ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☐ Information Disclosure Statement(s) (PTO/SB/08)
Paper No(s)/Mail Date _____
- 4) ☐ Interview Summary (PTO-413)
Paper No(s)/Mail Date _____
- 5) ☐ Notice of Informal Patent Application
- 6) ☐ Other: _____

Claims 38-45, 49, and 55 are objected to as being dependent upon a rejected base claim, but would be allowable if rewritten in independent form including all of the limitations of the base claim and any intervening claims.

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claims 36, 46-48, 50-54, and 56-59 are rejected under 35 U.S.C. 103(a) as being unpatentable over Kim (US 4442132), Kondo (JP 1-312960), Sato et al (JP 10-155410), and Berkowitz et al (US 5059432) for the reasons set forth in rejecting the claims in the last Office action. The amendments to the claims are not seen to influence the conclusion of unpatentability previously set forth.

Kim discloses a baked product comprising flour and xylitol as a sugar replacer (see entire document, especially the abstract and claim 1). Kim discloses that the product becomes soft quickly. It is noted that Kim discloses all bakery products (see claim 1), where bakery products would include wafers. Kim also discloses the use of egg, which contains water.

Kondo discloses a cake comprising erythritol as a sugar replacer in the amounts claimed (see abstract). Kondo also discloses xylitol, which is an aliphatic polyol as is claimed. None of the claims specifically claim a flour/starch content that differs from

Kondo. Kondo discloses the claimed components and a resulting baked product where deformability at an elevated temperature would be no more than obvious.

Sato et al disclose a wafer mixture comprising greater than 63.8 % by weight flour excluding water and 2-10% by weight erythritol (see abstract).

Berkowitz et al disclose a dough mixture comprising greater than 63.8 % by weight flour excluding water and xylitol (see entire document, especially Examples 1, 2, and claim 4).

The claims differ as to the specific type of baked product and the amounts used.

Once the art has recognized the use of erythritol and xylitol as sugar replacers and dough improvers in baked goods, the amount and manipulation of these components would be well-within the skill of the art. At most the amounts are seen as no more than optimization, see *In re Boesch* 205 USPQ 215.

It would have been obvious to a person of ordinary skill in the art, at the time the invention was made, to use xylitol and erythritol in baked products because the use of xylitol and erythritol as sugar replacers and dough improvers in baked products is conventional in the art as taught by Kim (US 4442132), Kondo (JP 1-312960), Sato et al (JP 10-155410), and Berkowitz et al (US 5059432).

Applicant has not established criticality to the amounts claimed. The claimed components are known in the art and are used for their art-recognized function to obtain expected results.

Applicant's arguments filed April 3, 2008 and October 9, 2008 have been fully considered but they are not persuasive.

Applicant argues that the prior art does not teach "said baked goods are heat-deformable when hot and maintain a heat-deformed shape when said baked goods are cooled."

Kim (US 4442132), Kondo (JP 1-312960), Sato et al (JP 10-155410), and Berkowitz et al (US 5059432) teach the conventional use of xylitol and erythritol as sugar replacers and dough improvers in baked products.

Claims 36 and 46 are directed to a "baking mixture," they are not directed to a baked good which may or may not be deformed. Claim 51 is directed to a baked good, it is not directed to a deformed baked good.

The claimed components are known in the art and are used for their art-recognized function. Applicant does not provide unexpected results.

THIS ACTION IS MADE FINAL. Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire **THREE MONTHS** from the mailing date of this action. In the event a first reply is filed within **TWO MONTHS** of the mailing date of this final action and the advisory action is not mailed until after the end of the **THREE-MONTH** shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of

the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Leslie Wong whose telephone number is (571)272-1411. The examiner can normally be reached on Tuesday to Friday.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Keith Hendricks can be reached on 571-272-1401. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

/Leslie Wong/
Primary Examiner, Art Unit 1794

LAW
September 11, 2009

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